Supreme Court, U.S.
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No. 03-549

IN THE

Supreme Court of the United States

TOP RANK, INC.,

Petitioner,

v.

FLORIDA STATE BOXING COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF OF RESPONDENT SHOWTIME NETWORKS INC. IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether a state may evade the First Amendment prohibition against content-based regulations of speech by claiming that its tax on revenues from pay-per-view boxing telecasts is really just a tax on boxing, and not a tax on telecasts.

2. Whether a state may evade the First Amendment prohibition against content-based regulations of speech on the ground that the First Amendment does not apply to competitions held for the purpose of entertaining live and remote audiences.

3. Whether a state may impose an extraterritorial tax on an out-of-state activity whose only nexus to the state is its telecast in the state.

CORPORATE DISCLOSURE STATEMENT

Showtime Networks Inc. is a wholly-owned subsidiary of Viacom Inc.

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BRIEF OF RESPONDENT SHOWTIME NETWORKS INC. IN SUPPORT OF THE PETITION

Showtime Networks Inc., an appellant below, licenses some of Petitioner Top Rank, Inc.'s pay-per-view boxing telecasts to cable operators in Florida and throughout the nation. As a party to the proceedings below, Showtime Networks Inc. is a designated respondent to this proceeding pursuant to Rule 12(6) of the Rules of the Supreme Court of the United States. It respectfully submits this brief in support of Top Rank, Inc.'s petition for a writ of certiorari.[1]

REASONS FOR GRANTING THE WRIT

Florida's tax on revenues from pay-per-view telecasts of out-of-state boxing matches is either a content-based tax on speech, which violates the First Amendment, or an extraterritorial tax on out-of-state activity, which violates the Commerce Clause and Due Process Clause. Either way, the tax is unconstitutional.

In upholding Florida's pay-per-view boxing tax, the court below directly contradicted decisions in Oregon, Georgia, and California striking down substantially identical taxation schemes. Indeed, the decision below creates clear conflicts on three important legal issues, all of which are ripe for this Court's resolution and none of which will become any clearer with the passage of time. In order to sustain Florida's tax, the court below had to hold (1) that a tax on telecast revenues should be treated for First Amendment purposes as a tax on the underlying event being televised rather than on the communication of that event; (2) that an entertainment event such as a boxing match is itself unworthy of any First Amendment protection; and (3) that Florida may tax *out-of-state*, as well as in-state, boxing matches. All three of these

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[1] Respondent incorporates by reference Petitioner's Statement of the Case. *See* Top Rank, Inc.'s Petition for Certiorari at 2-10 (hereinafter "Pet.").

holdings directly contradict decisions in Oregon, Georgia, and California.

The first and third of these holdings, moreover, directly contradict this Court's own decisions. In *Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, 502 U.S. 105 (1991), the Court made clear that the First Amendment prohibits content-based restrictions on speech without regard to whether the underlying activity being depicted is itself deserving of First Amendment protection. In numerous decisions on extraterritorial taxation, this Court also has made clear that taxes on out-of-state activities violate the Commerce Clause and Due Process Clause. This Court accordingly can resolve two of the three conflicts presented by this case—and dispose of the case entirely—without full briefing and argument. The Court should grant certiorari to resolve these conflicts and summarily reverse the decision below.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE CLEARLY PRESENTED CONFLICTS BETWEEN THE DECISION BELOW AND DECISIONS IN OREGON, GEORGIA, AND CALIFORNIA

Courts in Oregon, Georgia, and California have struck down taxation schemes identical to Florida's pay-per-view boxing tax as either content-based regulations on speech or extraterritorial taxes on out-of-state activity. The conflicts created by the decision below are squarely presented and will not become any clearer with the passage of time.

A. Oregon, California, and Georgia Have Struck Down Substantially Identical Taxes

Like Florida, Oregon imposed a tax on boxing promoters based on the total "fees" earned on the "pay-per-view telecast of a boxing or wrestling event that occurs . . . outside the state." Or. Rev. Stat. § 463.320(3), (4)(2001) (amended by

H.R. 2399, 72d Leg. (Or. Aug. 14, 2003)). This statute was invalidated because "Oregon has no jurisdiction to regulate boxing matches held outside the state," and the "state's imposition of a tax" therefore "can only be intended to regulate communication" and, thus, is a "content-based" regulation of speech that violates the First Amendment. *TVKO v. Howland*, 15 Or. Tax 335, 345-46 (2001), *aff'd* 335 Or. 527 (2003).

Georgia imposed a similar tax on "any promoter who shows or causes to be shown in this state a closed circuit telecast," including a "pay-per-view" telecast, "of any professional boxing event, whether or not the telecast or event originates in this state." Ga. Code Ann. §§ 43-8A-1(5), (23), 43-8A-40(b), 43-8A-80 - 82 (2000) (repealed 2001). Like the tax in Oregon, Georgia's pay-per-view boxing tax was invalidated as "a content-based restriction[] upon speech" that violates the First Amendment. *Showtime Networks, Inc. v. Georgia State Boxing Comm'n*, No. 1999CV04184, slip op. at 4-5 (Ga. Super. Ct. Nov. 23, 1999), Pet. App. 35a-36a.

California similarly passed a statute requiring "[e]very person who charges and receives a fee for exhibiting a simultaneous telecast" of a "boxing, kickboxing, martial arts" or "wrestling" "contest" to "pay . . . a 5 percent tax . . . of the amount paid for admission of subscription telecast." Cal. Bus. & Proc. Code §§ 18832, 18625. And, just as in Oregon and Georgia, the statute was invalidated as a tax upon "speech based solely on its content." *United States Satellite Broad. Co. v. Lynch*, 41 F. Supp. 2d 1113, 1120 (1999).

B. The Decision Below Creates Three Clearly Defined Conflicts

In refusing to follow the Oregon, Georgia, and California decisions, the court below created conflicts on three important legal issues, all of which are ripe for this Court's resolution.

1. First, the decision below creates a conflict on whether a tax imposed on revenues from the telecast of an event or activity should be treated for First Amendment purposes as a tax on the *telecast itself* or a tax on the *underlying event or activity* that is being televised. In order to hold that Florida's pay-per-view boxing tax does not implicate the First Amendment, the court found that the pay-per-view tax was imposed on *boxing*, rather than the *telecast* of boxing. Pet. App. at 15a ("[t]he activity that is being taxed is the promotion of the boxing match and not the provisions of commentary and interviews"). In so holding, the court below directly contradicted decisions in Oregon and Georgia that when states impose taxes based on pay-per-view revenues, what they "seek to regulate and tax is not the event but communications of and about the event." *TVKO,* 15 Or. Tax at 345; *see Showtime Networks, Inc.*, slip op. at 4; Pet. App. at 35a-36a ("The initial consideration before this Court is whether or not the regulations at hand impose content-based restrictions on speech. . . . Clearly this tax is imposed upon the content of the broadcast.").

2. Second, the decision below creates a conflict on whether an entertainment event such as a boxing match is subject to First Amendment protection. Proceeding on the (erroneous) assumption that *boxing*, rather than the *telecast* of boxing, should be the focus of its First Amendment analysis, the court below held that "a boxing match does not constitute either pure or symbolic speech." Pet. App. at 8a.; *see also id.* at 12a ("The question here is whether boxing, an athletic event in which the participants are attempting to win prize money, is a form of conduct which contains elements of communication or involves pure speech or symbolic

speech protected by the First Amendment.").[2] Courts in California and Georgia have held precisely the opposite. *See Lynch,* 41 F. Supp. 2d at 1120 (rejecting argument "that First Amendment protection does not attach to a live boxing match organized, held, and televised for the purpose of entertaining live and remote viewers"); *Showtime Networks, Inc.,* slip op. at 4, Pet. App. at 36a ("Defendants contend that strict scrutiny should not apply because boxing, as a sporting event, is not protected by the First Amendment, as it does not constitute 'speech.' This Court does not agree."). It is impossible to square the decision below with the decisions of courts in California and Georgia that "[t]he First Amendment protects entertainment" events such as a boxing match. *Lynch,* 41 F. Supp. 3d at 1120 (citing *Schad v. Mt. Ephraim,* 452 U.S. 61, 65 (1981)); *Showtime Networks, Inc.,* slip op. at Pet. App. at 36a ("It is apparent that the First Amendment protects entertainment and expressive conduct as forms of speech.") (citing *Simon & Schuster,* 502 U.S. 105; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Schad,* 452 U.S. 61; *Lynch*, 41 F. Supp. 2d 1113).

3. Third, the decision below creates a conflict regarding the power of a state to tax out-of-state activity whose only relationship to a state consists of its having been broadcast there. In the course of treating Florida's pay-per-view boxing tax as a tax on *boxing*, rather than a tax on the *telecast* of boxing, the court below held that Florida could tax out-of-state boxing matches. In so doing, the Court contradicted the decision of the Oregon Supreme Court–and numerous decisions of this Court, *see infra* at 11-13–that a state "has no jurisdiction to regulate boxing matches held outside the state." *TVKO,* 15 Or. Tax at 345-46; *see* 335 Or. at 537

[2] The court overlooked that, in most cases, boxers are paid just like other entertainers. They receive an agreed-upon amount regardless of whether they win or lose.

("plaintiff's boxing matches all had originated outside Oregon, *i.e.*, beyond the state's regulatory jurisdiction").

C. The Conflicts Created by the Decision Below are Ripe for This Court's Resolution

The conflicts created by the decision below are clearly presented and quite important. There is nothing to be gained by waiting to resolve them and a great deal to be lost.

1. The conflicts presented by this case are ripe for resolution by this Court and will not become any clearer with the passage of time. In Florida, the highest court with authority on challenges to state tax laws–the District Court of Appeal for the First District in Tallahassee–has spoken and the Florida Supreme Court has declined review. *See Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977) (describing "home-venue privilege," which requires that all challenges to state laws be brought in the court "where the state . . . maintains its principal headquarters"). In Oregon, the Oregon Tax Court and Supreme Court have spoken and the State of Oregon has decided to accept their decisions rather than seek review in this Court. *See* H.R. 2399, 72d Leg. (Or. Aug. 14, 2003) (repealing relevant sections of Or. Rev. Stat. § 463.320(3)-(4) (2001)). In Georgia and California, state officials have accepted lower court decisions, and the Georgia and California laws no longer are being enforced. Indeed, in the aftermath of its loss in the courts, the State of Georgia repealed its pay-per-view boxing tax. *See* Ga. Code Ann. §§ 43-8A-1 to 43-8A-100 (2000), *repealed by* Ga. Laws 2001, p. 752, § 2, eff. July 1, 2001.

This is not to say that the conflicts presented by this case will never again reach this Court. The decision below already has emboldened at least two other states to begin enforcing similarly unconstitutional pay-per-view boxing taxes. *See* Pa. Cons. Stat. Ann. §§ 302 & 916; 2003 Okla. Sess. Law Serv. Ch. 331. Until recently, Pennsylvania and Oklahoma had declined to enforce their pay-per-view boxing

taxes, presumably because of decisions invalidating similar laws in Oregon, Georgia, and California. Since the decision below issued, however, Pennsylvania and Oklahoma have resumed efforts to collect their taxes.

But even if a challenge to the Pennsylvania or Oklahoma statutes were to reach this Court, it would not likely offer a better vehicle or add anything to this Court's review. For one thing, no federal court of appeals will ever hear a challenge to the Pennsylvania or Oklahoma statutes. The U.S. Courts of Appeals for the Third and Tenth Circuits (which have jurisdiction over Pennsylvania and Oklahoma, respectively) have held that challenges to Pennsylvania and Oklahoma tax laws must proceed in state, and not federal, court under the Tax Injunction Act, 28 U.S.C. § 1341. *See Behe v. Chester County Bd. of Assessment Appeals*, 952 F.2d 66, 71 (3d Cir. 1991) (holding that tax challenge "properly belongs in the Pennsylvania state courts" and "that the Tax Injunction Act prohibited the District Court from exercising jurisdiction"); *Brooks v. Nance*, 801 F.2d 1237, 1240 (10th Cir. 1986) ("for purposes of section 1341, Oklahoma provides an adequate remedy to challenge the lawfulness of its taxing policies and practices").[3] Nor is it likely that the Court would ever have occasion to review a state supreme court decision affirming a pay-per-view boxing tax. If the Court denies certiorari here–and permits the Florida Supreme Court to evade this Court's review by itself declining to take the case–this would send a message to other state supreme courts. Those courts could likewise avoid this Court's scrutiny, and yet acquiesce in un-

[3] California's pay-per-view boxing tax was challenged in federal, rather than state court, because unlike most states (including Pennsylvania and Oklahoma) California failed to provide a "plain, speedy, and efficient" remedy and the Tax Injunction Act's prohibition against federal court challenges thus did not apply. *See Lynch*, 41 F. Supp. 2d at 1119-20.

constitutional state taxes, by themselves declining to review erroneous lower court decisions.

Nor is there anything to be gained by waiting for yet another case to come up through the courts in Florida. Even if the decision below emboldened Florida to extend its tax to other types of media or other types of content, this would not likely change the result below or offer this Court a better vehicle for review. Consider, for example, the legal challenge that would arise if Florida chose to tax boxing promoters each time their matches appeared on free, as well as pay-per-view television–whether on a monthly subscription program service like ESPN, on a national network like CBS, or on a local television news program's nightly sports coverage. Florida might impose a tax, for example, when A&E's Biography Channel aired a program on the life of Muhammad Ali that included video and commentary on his emergence as a star in the 1960 Rome Olympics and his politically charged "Rumble in the Jungle" match in Kinshasa, Zaire in 1974.[4] Alternatively, or in addition, Florida might expand its tax to other types of sports and entertainment that it finds distasteful but that do not qualify as "speech" under the decision below. Florida might tax broadcasts of all sports that are violent or value strength (*e.g.*, boxing, football, and auto racing) but not those that are non-violent and value finesse (*e.g.*, golf). Florida likewise might tax "reality television shows" that prize courage and exhibitionism (by requiring contestants to survive on a remote island, jump from great heights, or eat live insects) but not traditional game shows that reward basic trivia knowledge or luck.

Given the holding below that a tax on a telecast is really just a tax on the underlying event being televised, and that

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[4] Indeed, if the talk show host Rush Limbaugh were to suggest that a boxer was overrated because of his race, just as he did recently with respect to a star football player, the ensuing media coverage of that athlete's performance in the ring might trigger a tax.

the First Amendment does not apply to "events where the participants are attempting to win prize money," Pet. App. at 12a, the First District Court of Appeal would likely affirm such new taxes, whether imposed on advertising-driven media or subscription media, on boxing or other disfavored competitions. And, given its acquiescence in the erroneous decision below, there is no reason to believe that the Florida Supreme Court would react any differently to such an extension of Florida's tax.

In short, whether a new challenge were to arise in Florida or some other state there is no reason to believe that the conflicts presented would be any riper for this Court's resolution. In all likelihood this Court would face the same split it faces today–one that already involves exhaustive opinions on four different states' laws, all of which raise the exact same legal issues.[5] If the Court is ever going to resolve the con-

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[5] The court below tried to distinguish Florida law on the ground that it "involve[d] taxation of a boxing *promoter*," whereas the cases in Georgia, Oregon, and California involved taxes on "cable operators" or "cable programmers" who broadcast the event in question. Pet. App. at 9a (emphasis added). In fact, both the Oregon and Georgia statutes invalidated under the First Amendment did directly tax boxing "promoters." *See* Or. Rev. Stat. § 463.015(13)(b)(2001) (amended 2003) (defining "promoter"); Ga. Code Ann. § 43-8A-40(b)(2000) (repealed 2001) (same). Moreover, as Petitioner points out in this case, boxing promoters *are* "cable programmers" because just like those who produce the rock concerts and motion pictures that are telecast using pay-per-view, boxing promoters produce the content that is being telecast. Pet. at 4-5, 15-16; *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 628 (1994) ("The cable television industry includes both cable operators (those who own the physical cable network and transmit the cable signal to the viewer) and cable programmers (those who produce television programs and sell or license them to cable operators)."); *Simon & Schuster*, 502 U.S. at 117 ("The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker."). Indeed, even the Florida court itself conceded that what is important for First Amendment purposes is the nature of the activity being taxed, not the identity of the taxpayer. It explained: "if we were dealing with either pure speech or symbolic speech, we would be required to reject the Box-

flicts created by the decision below–and is ever going to decide whether a state can single out television programs for taxation based on their content–this is the case to do it.

2. Although there is nothing to gain by waiting to resolve the conflict presented by this case, there is a great deal to lose. Broadcast rights for sports and entertainment programming typically involve nationwide deals, negotiated well in advance, often in multi-year contracts.[6] The decision below may apply today only to boxing telecasts in Florida, but the uncertainty it creates will have much broader consequences, as the recent enforcement efforts in Pennsylvania and Oklahoma make clear. At any given time, broadcasters are engaged in forward-looking negotiations with producers of sports programming, movies, situation comedies, dramas, game shows, and "reality television shows." And, at any given time, production companies must allocate their resources among the various types of programming they produce and sell to broadcasters. Faced with an uncertain legal regime under which some of these shows may be subject to taxation while others are not, and in which taxation will vary from state to state, broadcasters and production companies may favor some types of programming over others. Florida's decision to disfavor one type of broadcast could affect not only boxing fans in Florida and those wishing to reach them, but also television viewers, broadcasters, and production companies throughout the nation. If the Court does not intervene now to resolve the uncertainty created by the deci-

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ing Commission's argument that merely because a person or entity may be several steps removed from the actual dissemination of speech, they are not entitled to First Amendment protections." Pet. App. at 11a. *See infra* at 14-15 (discussing *Simon & Schuster*'s protection of everyone in the chain of communication).

[6] For example, NBC recently outbid other networks for the right to televise Olympic Games (including Olympic boxing) that will not take place for another 9 years.

sion below, this will undermine the First Amendment rights not only of those who wish to reach pay-per-view boxing fans in Florida, but also of speakers and listeners in a variety of media, on a variety of topics, throughout the nation.

II. THIS COURT SHOULD SUMMARILY REVERSE BASED ON ITS NUMEROUS DECISIONS ON EXTRATERRITORIAL TAXATION AND ITS DECISION IN *SIMON & SCHUSTER*

The decision below is at odds not only with decisions of courts in three other states, but also with this Court's own precedents. Based on these precedents, the Court can resolve two of the three conflicts presented by this case, and dispose of the case entirely, without full briefing or argument. Although the Court has never directly addressed whether a sporting event like boxing is itself protected under the First Amendment, and this question presumably would require full briefing and argument, the Court need not resolve this question in order to dispose of this case. The Court *has* squarely held that a state (1) may not tax an activity like boxing if it occurs entirely *out of state*, and (2) may not impose a content-based tax on the *publication or telecast* of depictions of an activity like boxing. Thus, whether or not boxing itself is protected by the First Amendment, out-of-state boxing is protected from taxation in Florida and so is the telecast of boxing regardless of where the actual boxing match is held. The Court should summarily reverse the decision below as squarely contrary to its numerous decisions on extraterritorial taxation and its holding in *Simon & Schuster* that states may not tax the publication or telecast of the depiction of an activity regardless of whether the underlying activity itself is protected by the First Amendment.

1. Whether or not boxing is protected by the First Amendment, Florida's tax cannot possibly be upheld as a tax on boxing because Florida lacks the authority to impose such an extraterritorial tax on boxing matches held elsewhere. In

numerous Commerce Clause decisions, the Court has squarely prohibited states from taxing or regulating out-of-state activity. *See, e.g. Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992) (asking, among other things, whether "'tax . . . is applied to an activity with a substantial nexus with the taxing State, . . . and . . . is fairly related to the services provided by the State.'" (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332 (1989) (invalidating regulation that has "the 'practical effect' of regulating commerce occurring wholly outside that State's borders"); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986) (imposing regulatory requirements "in one State" upon "a transaction in another directly regulates interstate commerce"); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (a "State has no legitimate interest in protecting nonresident shareholders"); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945) (invalidating law because the "practical effect of such regulation is to control [activity] beyond the boundaries of the state"); *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 424 (1937) (state may not tax the "exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed").

Indeed, such an extraterritorial tax on out-of-state matches would violate not only the Commerce Clause, but also the Due Process Clause. *See, e.g. Quill*, 504 U.S. at 306 ("The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' and that the 'income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.'") (quoting *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 344-45 (1954) and *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 273 (1978)); *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934) (the Due Process Clause prevents a

state from "extend[ing] the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made"). To the extent that Florida's pay-per-view tax is deemed a tax on boxing matches held in Nevada or elsewhere outside the state of Florida, rather than on the telecast of boxing in Florida, the tax violates the Due Process Clause and the Commerce Clause.

2. In treating Florida's pay-per-view tax as a tax on boxing, rather than a tax on telecasts, the Court below violated not only this Court's settled precedents on extraterritorial taxation, but also its First Amendment decision in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). Under *Simon & Schuster*, it does not matter whether boxing itself is protected under the First Amendment. Indeed, *Simon & Schuster* prohibits a state from imposing content-based restrictions on publications or telecasts even when the content singled out for taxation involves *illegal* activity.[7] *Simon & Schuster*, 502 U.S. at 117 ("'We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment'") (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). What matters under *Simon & Schuster* is that a tax is imposed on efforts to *broadcast or publish* depictions of the underlying activity. 502 U.S. at 115 (law is "presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). Whether

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[7] The state law at issue in *Simon & Schuster* targeted revenues earned from the publication or telecast of a convicted criminal's account of his crime, rather than a lawful activity like boxing. *Simon & Schuster*, 502 U.S. at 108-09 (noting that law targeted depiction of crime distributed "by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation").

boxing itself is protected by the First Amendment, as courts in California and Georgia have held, *Lynch,* 41 F. Supp. 2d at 1120; *Showtime Networks, Inc.*, slip op. at 4, Pet. App. at 36a, or boxing itself is unprotected, as the Florida courts have held, Pet. App. at 8a, this Court's decision in *Simon & Schuster* makes clear that a state may not single out the *telecast* of boxing for taxation.

In its effort to characterize Florida's law as a tax on boxing promotion, rather than on the telecast of boxing, the court below emphasized that Florida sends the actual tax bill to the boxing promoter. "In the instant case," the court observed, "we are not dealing with taxation of a member of the media." Pet. App. at 12a. In so doing, the court below once again contradicted *Simon & Schuster*. In *Simon & Schuster*, this Court explained that "the characterization of an entity as a member of the 'media' is irrelevant," because the "government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker." 502 U.S. at 117.[8] *Simon & Schuster*'s broad protection of everyone in the chain of communication reflects an economic reality that Showtime Networks Inc. lives with every day. When Showtime negotiates with boxing promoters like Top Rank, those promoters try to pass along to Showtime the cost of any state taxes they are required to pay.

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[8] Like the court below, the state in *Simon & Schuster* defended its law based on who was being taxed. The state argued "that even if the First Amendment prohibits content-based financial regulation specifically of the *media*, the Son of Sam law is different, because it imposes a general burden on any 'entity' contracting with a convicted person to transmit that person's speech." 502 U.S. at 117. The Supreme Court squarely rejected this distinction, not only because as a constitutional matter it does not matter whether an entity is considered part of the "media," *id.*, but also because a person who produces content that will be carried by the media–whether a book written by a criminal or a boxing match produced by Top Rank—"becomes by definition a medium of communication, if it was not one already." *Id.*

And, as Showtime's expenses go up, it likewise seeks to pass on at least a portion of those costs to cable operators, who presumably try to pass them along to consumers. How the tax burden ultimately is spread over those who produce, distribute, telecast, and view boxing programs depends not on where the tax bill is sent, but rather on contract negotiations and market forces. The only thing that is certain is that the tax will be borne by someone in the chain of communication and will serve as "a financial disincentive to create or publish works with a particular content." *Simon & Schuster*, 502 U.S. at 118. For First Amendment purposes, it does not matter whether the "financial disincentive" manifests itself in lower profits for producers, distributors, and cable operators or in higher prices for viewers. Whether the tax discourages companies from offering a particular type of program or discourages viewers from watching is not important. What is important is that, by chipping away at *Simon & Schuster*'s broad protection of the entire chain of communication, the decision below suppresses speech on the basis of its content in violation of the First Amendment.

Indeed, it is worth noting that by focusing on the underlying activity being televised—boxing—rather than on the simple fact that Florida has imposed a content-based tax on telecast revenues, the court below not only sanctioned Florida's constitutional violation, but also committed its own, independent, First Amendment violation in the course of justifying its decision. The court drew doctrinal distinctions among telecasts based on their subject matter, explaining that some types of telecasts deserve protection but others do not. *See* Pet. App. at 15a. For a court to favor some forms of communication over others in this manner is anathema to the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). The decision below, just like the tax it affirmed, violates the

First Amendment prohibition against content-based regulation of speech. Its erroneous holding and dangerous reasoning warrant this Court's intervention.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari and summarily reverse the decision below.

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